APPENDIX A

The Relevant Part of the February 16, 1956, Opinion of the California District Court of Appeal is as follows:

4. DAMAGES: JURISDICTION.

The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: PROVIDED, *That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .*" (29 U.S.C. § 158, emphasis added.) In construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improperly deprived thereof by his union. As said in Mahoney v. Sailors' Union of the Pacific (Wash., 1954) 275 P. 2d 440, improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. (See also Real v. Curran, 138 N.Y.S. 2d 809.) But a different situation results when the member seeks damages as a result of such expulsion. The courts hold that the act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through "the procedures followed by the union whereby employers were caused to discriminate against" such members (idem, p. 444); such proceedures constitute an unfair labor practice. There are many cases holding it to be an unfair labor practice for the union in any way to cause an employer to fail to employ the discharged member. Among others are Born v. Laube, 213 F. 2d 407, cert. den. Oct. 18, 1954, 348 U.S. 855; Radio Officers' Union, etc. v. National L. R. Bd., 347 U.S. 17, 74 S. Ct. 323; Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 75 S. Ct. 480. There are three cases, almost identical in this respect with the one at bar, in which the union after improperly expelling the member, took no active steps to notify the employer not to employ him, but, as

here, merely refused to issue the employee a hiring hall card or to dispatch him to the job. In each of those cases it was held that such action constituted an "attempt to cause an employer . . . to discriminate against" the employee (29 U.S.C. § 158), and therefore was an unfair labor practice as to which Congress had given the Labor Relations Board exclusive jurisdiction. (Mahoney v. Sailors' Union of the Pacific, supra, 275 P. 2d 440; Sterling v. Local 438, etc., (Md., 1955) 113 A. 2d 389; Real v. Curran, supra, 138 N.Y.S. 2d, 809.) In the latter case the court said (p. 812): "If the union caused or attempted to cause plaintiff's discharge from his existing employment with the United States Lines, as is alleged—*either by hiring procedures*, or by causing union members not to work with him—it has committed an unfair labor practice within the contemplation of the section, and the National Labor Relations Board can direct the union to cease and desist from such conduct." (Emphasis added.)

As said in Real v. Curran, supra, 138 N.Y.S. 2d 809, 813-814, the illegal expulsion of a member from the union does not constitute an unfair labor practice as such and therefore "the Board cannot restore plaintiff's union membership because its power to direct affirmative action is dependent upon its finding of an unfair labor practice. . . . It is the causing or attempting to cause the employer to discriminate against an employee . . . that brings the Board's power into play . . . It is, therefor , concluded that the provisions of the Labor Management Relations Act, 1947, do not exclude the State courts from their traditional jurisdiction to restore to membership a wrongfully expelled member of the union."

Because the withholding from petitioner of the required card to obtain employment and the refusal of the union's dispatcher to send petitioner out on a job constituted unfair labor practices, and consequently the exclusive jurisdiction of the damages issue is in the Labor Relations Board, we are forced to hold that the award of damages

by the trial court was beyond the jurisdiction of the court and must be reversed.

Those portions of the judgment awarding petitioner damages are reversed. In all other respects the judgment is affirmed. Petitioner will recover costs.

APPENDIX B

The Relevant Part of the June 12, 1956, Opinion of the California District Court of Appeal is as follows:

4. DAMAGES: (a) *Jurisdiction.*

In determining the question of whether the exclusive jurisdiction to grant damages in a case of this kind lies in the Labor Relations Board, it is first necessary to determine the character of the pleadings and issues in this case. The petition alleged a breach of contract between the union and plaintiff, one of its members.* It took the form of a petition for writ of mandate because damages alone would not be adequate to restore to petitioner the things of value he had lost by reason of the breach. No charge of "unfair labor practices" appears in the petition. The answer to the petition denied its allegations and challenged the jurisdiction of the court, but said nothing about unfair labor practices. The evidence adduced at the trial showed that plaintiff, because of his loss of membership, was unable to obtain employment and was thereby damaged. However, this damage was not charged nor treated as the result of an unfair labor practice but as a result of the breach of contract. Thus the question of unfair labor practice was not raised nor was any finding on the subject requested of, or made by, the court.

So far as plaintiff's improper expulsion from the union is concerned, there could be no question of unfair labor practice.

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* See *Harris* v. *Nat. Union etc. Cooks & Stewards, supra,* 98 Cal. App. 2d at p. 736: "The constitution of the union constitutes a contract with the members . . ."

The Taft-Hartley Act prescribes in part: "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: PROVIDED, *That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .*" (29 U.S.C.A. § 158; emphasis added.) In construing this section the courts have held that the courts have jurisdiction to restore union membership to a member improperly deprived thereof by his union. As said in Mahoney v. Sailors' Union of the Pacific, (1954) 45 Wn. 2d 453 [275 P. 2d 440], improper expulsion by the union does not constitute an "unfair labor practice" which under the act takes jurisdiction away from the courts. (See also Real v. Curran, 285 App. Div. 552 [138 N.Y.S. 2d 809].)

So far as the award of damages is concerned, it was awarded not for an unfair labor practice, but for breach of contract and as incidental to the restoration to plaintiff of his right of membership. The contention that the Labor Relations Board has sole jurisdiction of the question of damages in a case of this kind was made and answered in Taylor v. Marine Cooks & Stewards Assn., 117 Cal. App. 2d 556, 564: "Appellants argue that these disputes are solely cognizable by the National Labor Relations Board under the Taft-Hartley Act. (29 U.S.C.A. § 158 (b) 2.) The damages suffered by respondents were an incident of the wrongful act of appellant union in taking disciplinary action against them in a manner which was violative of their rights under the constitution of the union. Nowhere in the Taft-Hartley Act is the N.L.R.B. given jurisdiction or authority to review the legality of any disciplinary action taken by a union against one of its members or to order a member's reinstatement in the union or to award damages resulting from his wrongful

expulsion. These powers are left in the courts of law where they have always resided. We find nothing in the Taft-Hartley Act to deprive a court of the power to do complete justice between a wrongfully disciplined member and his union by allowing such damages as he may have suffered as an incident to the judgment restoring him to the rights within the union of which he had been illegally deprived."

There are many cases holding it to be an unfair labor practice for a union in any way to cause an employer to fail to employ an expelled member (whether the expulsion be proper or improper), and that the National Labor Relations Act authorizes the Labor Relations Board to compensate the member for loss of earnings if lost through the procedures followed by the union whereby employers were caused to discriminate against such members. (Real v. Curran, supra, 138 N.Y.S. 2d 809.)* But in all those cases the *charge was made that the acts of the union constituted unfair labor practices and such charge was an issue in each case.* As we have pointed out it was not an issue here. In Weber v. Anheuser-Busch, Inc., supra, 348 U.S. 468, where the issue was whether the unions were guilty of unfair labor practices the court must have had this very distinction in mind for after referring to the "delicate problem of the interplay between state and federal jurisdiction touching labor relations" (p. 474) and after stating (p. 480) "the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much'" (quoting from Garner v. Teamsters Union, 346 U.S. 485, 488) it prefaced its conclusion that the state court did

* Among other cases are: *Born* v. *Laube,* 213 F. 2d 407, cert. den. Oct. 18, 1954, 348 U.S. 855; *Radio Officers* v. *Labor Board,* 347 U.S. 17; *Weber* v. *Anheuser-Busch, Inc.,* 348 U.S. 468; *Mahoney* v. *Sailors Union of the Pacific, supra,* 275 P. 2d 440; *Sterling* v. *Local 438, etc.* (Md., 1955) 113 A. 2d 389.

not have jurisdiction of the unfair labor practices charged, as follows: " . . . *where the moving party itself alleges unfair labor practices* . . ." P. 481; emphasis added.) In United Workers v. Laburnum Corp., 347 U.S. 656, the court held that the National Labor Relations Act did not give such exclusive jurisdiction to the National Labor Relations Board as to deprive a Virginia state court of jurisdiction to try a common law tort action brought by a construction company against a union even though the United States Supreme Court assumed the conduct constituted an unfair labor practice under the act.*

In Real v. Curran, supra, 138 N.Y.S. 2d 809, where a member allegedly was illegally expelled from his union, the court held that the Labor Relations Board could only act where there was an unfair labor practice, that improperly expelling the member did not constitute such practice and hence the board had no power to restore his union membership. Therefore it held that there was nothing in the Labor Relations Act which would affect the law which had long existed in New York that a wrongfully expelled member of a labor union was entitled to restoration by the state courts to union membership and "in a proper case, damages for consequent loss of wages." (P. 811.) "It is, therefore, concluded that the provisions of the Labor Management Relations Act, 1947, do not exclude the State courts from their traditional jurisdiction to restore to membership a wrongfully expelled member of the union." (P. 814.)

In International Union, etc. v. Hinz, 218 F. 2d 664 (U.S. Ct. of Appeals, 6th Cir., 1955) the plaintiff sued the union in the state court of Michigan for damages (not for reinstatement in the union) charging that his union membership had been wrongfully terminated, and asking

* It is significant that there, as here, the trial court made no finding that the acts in question did constitute unfair labor practices.

both compensatory and exemplary damages for loss of wages, etc. The union filed a complaint in the U.S. District Court praying for an injunction against the prosecution of said suit in the state court. In upholding the action of the District Court in dismissing this complaint, the reviewing court held: "Appellee's work did not cease as a consequence of a current labor dispute nor because of an unfair labor practice." (P. 665.) "The Board has no jurisdiction in disputes between a union and its members nor authority over the internal operation of a union." (P. 665. See also Amalgamated Clothing Workers of America v. Richmond Bros. Co. (6 Cir.) 211 F. 2d 449, and International Union of Electrical, Radio and Machine Workers, C.I.O. v. Underwood Corp., 219 F. 2d 100.)

In Holderby v. International Union etc. Engrs., supra, 45 Cal. 2d 843, the plaintiff filed an action in which he sought and obtained reinstatement as a member in good standing in the union and damages resulting from his allaged unlawful exclusion therefrom. While the Supreme Court reversed the judgment on the ground of the plaintiff's failure to exhaust his administrative remedy, it is interesting to note that the court nowhere intimates that it did not have jurisdiction of the subject matter of the acion. Likewise in Weber v. Marine Cooks' & Stewards' Assn., 123 Cal. App. 2d 328, the plaintiff sued for reinstatement in his union after an alleged wrongful expulsion and for damages in the loss of wages and for mental suffering (just as plaintiff did here). The trial court granted a motion for nonsuit on the ground of laches alone. The reviewing court reversed the judgment and sent the case back for trial. It evidently had no doubt concerning its jurisdiction.

The language of William J. Isaacson in his article, "Labor Relations Law: Federal versus State Jurisdiction," appearing in the May, 1956, American Bar

Association Journal (vol. 42, No. 5, p. 415) is applicable here. After calling attention to the fact that there is a conflict between the courts, both state and federal, which have considered the question here involved, and that the United States Supreme Court has not passed upon it, and then referring to Real v. Curran, supra, 138 N.Y.S. 2d 809, and Mahoney v. Sailors' Union of the Pacific, supra, 275 P. 2d 440, the article then states (p. 483): "Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms."

DAMAGES: (b) *Award.*

Appellants contend that there is no evidence to support the award of $6800 damages for loss of wages.* Petitioner testified that his earnings were nearly always $100 per week at least, and frequently between that figure and $200. At the time of his expulsion from the union he was employed as a marine machinist by the General Electric Company. About four days thereafter he was injured on the job, incapacitated approximately three weeks. The ordinary practice was for employers to telephone the union hall for men, and the union members

* They apparently do not claim the evidence is insufficient to support the award of $2500 for mental distress.

would be dispatched to the work. Thereafter he applied to the union for an assignment to a job as he had done prior thereto. He was refused dispatch by the union dispatcher. He testified he sought work directly from the employers but without success. Although there was some testimony to the effect that the union might dispatch a nonmember to a job if he had a letter from the employer requesting him, the dispatcher testified that plaintiff would not have been dispatched even if he had such letter. There was ample evidence to support the award.

The judgment is affirmed.

APPENDIX C

The Relevant Provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 141, et seq.) are as follows:

SECTION 1.

* * * * * * * * * *

(b)

* * * * * * * * * *

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual empoyees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

* * * * * * * * * *

"SEC. 2.

* * * * * * * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any

Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"(8) The term 'unfair labor practice' means any unfair labor practice listed in section 8.

* * * * * * * * * * *

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * * * * * * * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this

Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; [and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:] *and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h),* and *(ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly re-

quired as a condition of acquiring or retaining membership;

* * * * * * * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even

though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the

district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice, may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him

of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * * * * * * * *

"(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.